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Judicial review and governmental bad faith

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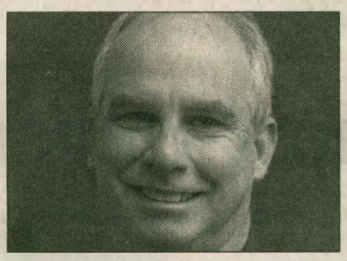

JOHN GREABE
Constitutional Connections

This column is the third and final installment of a series considering some potential implications of *June Medical Services v. Russo*, a case involving a constitutional challenge to a Louisiana law regulating access to abortion services. The United States Supreme Court heard arguments in the case on March 4. A decision is expected shortly.

The first column sought to place *June Medical Services* in context by describing the history of constitutional abortion-rights litigation at the Supreme Court. The second explained what the case is likely to tell us about the respect the court will show to prior constitutional precedents – prior Supreme Court decisions interpreting the Constitution – with which it disagrees.

This column discusses how the case illustrates the difficulties presented when courts are asked to assess the constitutionality of laws alleged to have been enacted, or of other government action alleged to have been undertaken, in bad faith – that is, for reasons other than those suggested on the face of the law or provided to justify the action. As discussed below, *June Medical Services* is not the only recent Supreme Court case to have grappled with this issue.

Recall that *June Medical Services* involves a challenge to a Louisiana law requiring that physicians performing abortions hold admitting privileges at a hospital within 30 miles of the facility where the abortion is performed. On its face, the law appears to be a regulatory measure designed to ensure maternal health. But in reality, abortion is a very safe medical procedure that rarely requires hospitalization. And hospitals usually condition admitting privileges on the number of patients that a physician admits.

The law thus creates a catch-22. Physicians who perform abortions must have admitting privileges at a nearby hospital. Yet they cannot obtain or maintain such privileges because the need to hospitalize abortion patients arises so rarely. Thus, the effect of the law would likely be to reduce the number of physicians permitted to perform abortions in Louisiana.

There is strong evidence that the authors of the law knew and intended this result. Consequently, there is strong evidence that the law's actual purpose was to reduce the number of abortions performed in the state, and not to preserve maternal health.

So does this legislative "bad faith" make the law unconstitutional? Possibly. But as with so many issues in constitutional law, it depends. Justices from the conservative and liberal wings of the court tend to disagree about the extent to which it is appropriate for judges to question the motives of other governmental branches and actors.

Bad faith does not make governmental conduct unconstitutional in and of itself. A litigant challenging the constitutionality of a law does not prevail merely by showing bad faith. Rather, the litigant must show that the bad-faith explanation masks an unconstitutional purpose behind the law or governmental action.

In cases that do not involve fundamental rights or allegations that the government is trying to cover up presumptively unconstitutional discrimination, courts assume good faith and ask only whether the challenged law or conduct *could be* justified by some conceivably legitimate purpose. The presumption of good faith applied in most cases avoids unnecessary confrontations with other branches of government and permits courts to sidestep the sticky problem of determining the subjective intent of an actor or institution – for example, a legislature – that may be comprised of many individuals who often act for different reasons.

U.S. Railroad Retirement Board v. Fritz (1980) illustrates this point. The case involved a challenge to a federal law that sought to prevent retired railroad workers from collecting benefits under both the railroad retirement system and the Social Security system. The law permitted those who were already retired and receiving benefits from both sources to continue to receive them. But it disallowed those who were not yet retired from doing so unless they had worked for the railroads for 25 years. The result was that a current retiree who had worked only 10 years for the railroads would collect dual benefits. Yet a person who had worked 24 years for the railroads and was still employed would not.

Workers negatively affected by the law challenged it as unconstitutionally irrational and arbitrary. But the Supreme Court rejected the challenge. Accepting the government's argument that Congress could have concluded that those who had acquired a statutory entitlement to benefits from both sources while still employed in the railroad industry "had a greater equitable claim to those benefits" than those who were in the negatively affected class, the court held that this merely *conceivable* purpose was enough to sustain the law even if it was not the *actual* purpose.

This is the default, presumptively applicable approach. But in cases (unlike *Fritz*) involving allegations that governmental bad faith masks an intent to infringe a fundamental right or to engage in presumptively unconstitutional discrimination, the court does not stop the inquiry upon a showing of some conceivable, legitimate purpose. Instead, recognizing that such a deferential approach would not sufficiently safeguard essential constitutional guarantees, courts will proceed to examine the actual purpose(s) of the law or action.

In such cases, the justices of the Supreme Court are unlikely to disagree about the enforceability of laws or other government action prompted by an unconstitutional purpose. But they are quite likely to disagree about how easily courts should find that the law or action has been tainted by an unconstitutional purpose. In recent cases involving claims of governmental bad faith, the more liberal justices have shown a greater willingness to find bad faith, while the more conservative justices have tended to show more deference to politically accountable authorities.

Consider, in this respect, *Trump v. Hawaii* (2018) and *Department of Commerce v. New York* (2019). In the former case, Chief Justice John Roberts (who now appears to be the court's swing vote) sided with the conservatives to reject a claim that President Donald Trump's "travel ban" masked unconstitutional religious discrimination against Muslims. In the latter case, however, he sided with the liberals to find that the reason given by the administration for attempting to add a citizenship question to the 2020 census was not supported by the record.

Fast forward to the *June Medical Services* case. In 2016, in *Whole Woman's Health v. Hellerstedt*, the Supreme Court issued a 5-3 ruling striking down a Texas law that was very similar to the Louisiana law whose constitutionality is under review in *June Medical Services*. (Justice Antonin Scalia had recently passed away and his seat was then unfilled.) The majority concluded that the law's purpose was to place a substantial obstacle in the path of a woman choosing to exercise her right to terminate a pregnancy, and *not* to preserve maternal health. Under court precedent, this finding made the law unconstitutional.

But since *Whole Woman's Health* was decided, Justice Anthony Kennedy has retired and been replaced by Justice Brett Kavanaugh. Moreover, Justice Neil Gorsuch has filled the vacancy left by Justice Scalia. Thus, *June Medical Services* may well provide us with further instruction on the extent to which the current court will be open to giving close review to whether politically accountable actors have acted in good faith in exercising their constitutional authority.

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